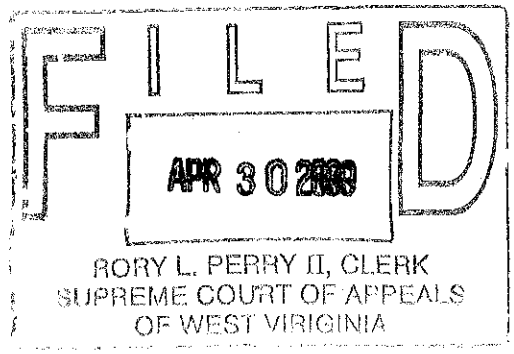
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS




MICHELLE JONES, in her capacity as Administratrix of the Estate of Julia Toler, Deceased,

Appellant/Plaintiff,

v.

Appeal No. 34619

EDWARD R. SETSER, M.D.; and HUNTINGTON CARDIOTHORACIC SURGERY, INC.,

Appellees/Defendants

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**BRIEF OF APPELLEES, EDWARD R. SETSER, M.D., AND HUNTINGTON CARDIOTHORACIC SURGERY, INC.**

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Respectfully submitted,

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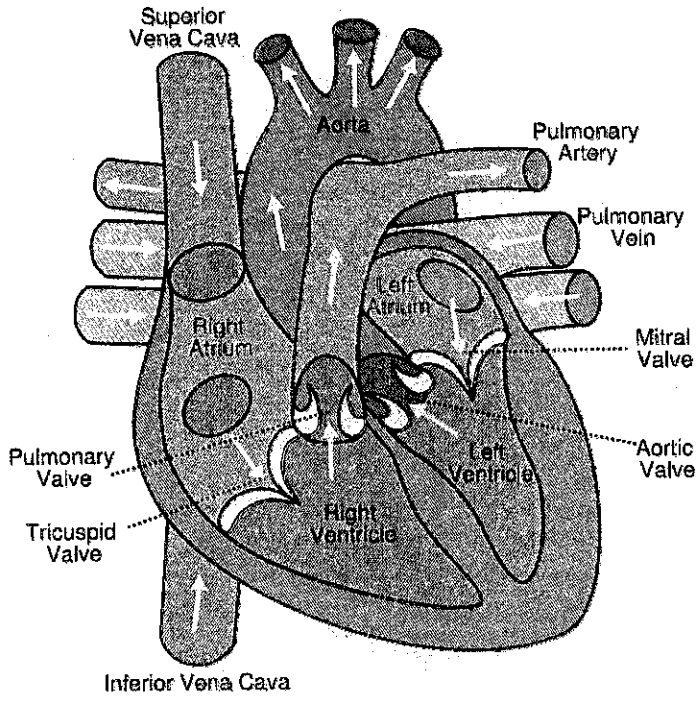
## II. KIND OF PROCEEDING AND NATURE OF RULINGS IN LOWER TRIBUNAL

The Appellees, Edward R. Setser, M.D., and Huntington Cardiothoracic Surgery, Inc., file this response to Appellant, Michelle Jones', Administratrix of the Estate of Julia Toler, Rule 3 Petition for Appeal pursuant to the West Virginia Rules of Appellate Procedure. Appellees respectfully request that this Honorable Court affirm the August 7, 2008 Order entered by the Circuit Court of Cabell County, West Virginia, the Honorable John L. Cummings presiding, denying Appellant's motion to set aside the verdict and award a new trial and for sanctions premised on the alleged violation of a motion *in limine* and alleged improper comments made during closing argument.

## III. STATEMENT OF FACTS

The Appellant's decedent, Julia Toler, was a 61 year old woman with a longstanding history of heart valve disease resulting from contracting rheumatic fever when she was a child. In 1980, she had open heart surgery to correct a defect in the heart's mitral valve which controls the flow of blood through the left ventricle and left atrium chambers of the heart. During this procedure, her sternum was divided surgically in order to expose the mitral valve. After the surgery, surgical wires were used to hold the sternum in place while healing occurred. The wires were not removed and remained in place until her second open heart surgery in 1999. Ms. Toler did reasonably well for several years after her surgery, but by the early 1990's, her health declined. She was a chronic smoker for years and suffered from chronic obstructive

pulmonary disease (COPD). She also experienced considerable difficulties with




***Trial Exhibit Depicting Normal Structures of the Heart***

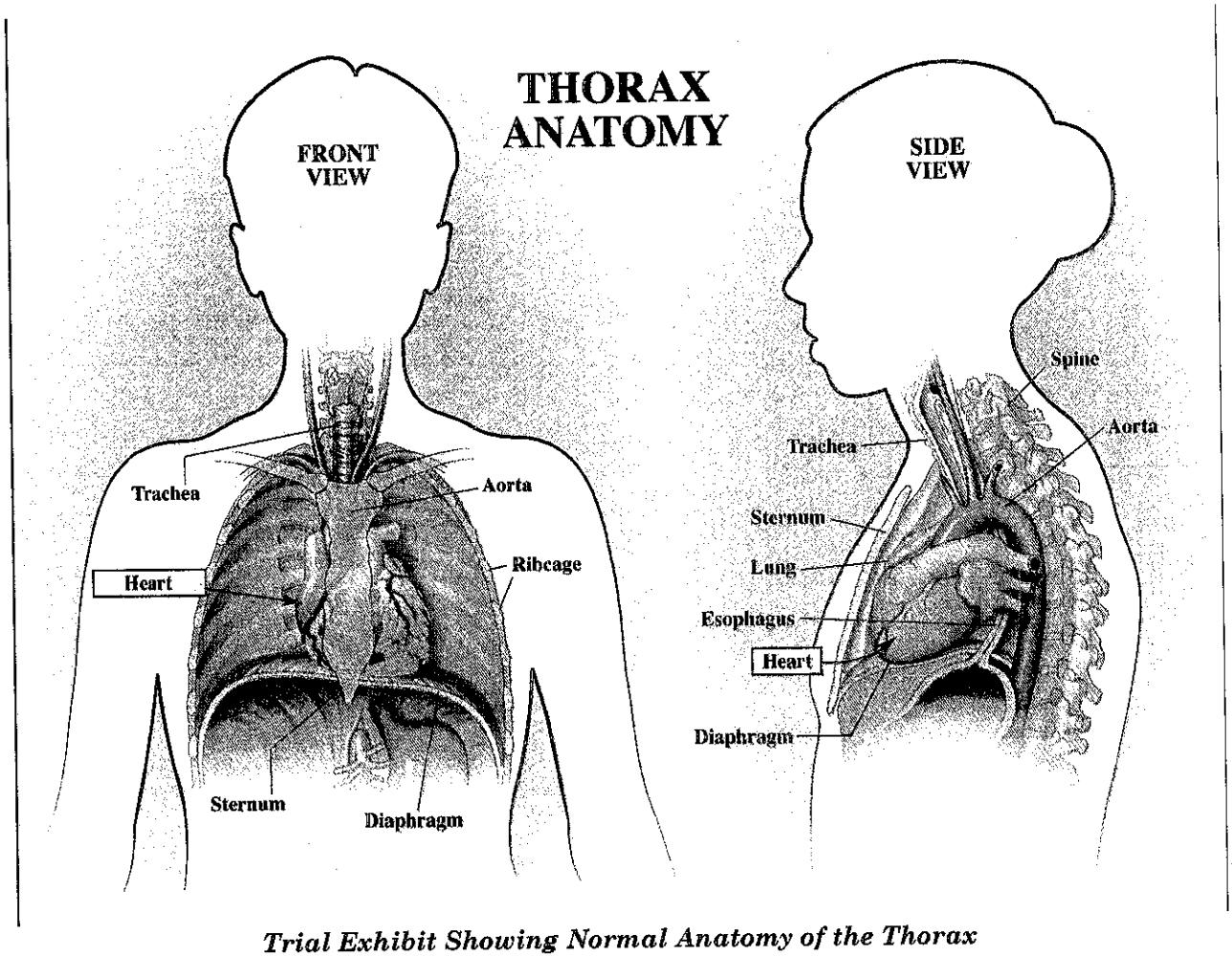
congestive heart failure, chronic chest pain, anxiety, and depression.

In 1999, Ms. Toler underwent a diagnostic cardiac catheterization performed by a Huntington cardiologist, Dr. Everett Wray. This study confirmed the presence of severe mitral valve stenosis. Mitral valve stenosis is a medical condition in which the mitral valve of the heart does not move properly, thus impeding the normal flow of blood through the chambers of the heart. By the time she saw Dr. Wray, Ms. Toler's health was so compromised that she could not perform her everyday household functions, or even walk half of a block without suffering severe shortness of breath and fatigue. Dr. Wray referred Ms. Toler to the defendants, Dr. Edward Setser and

Huntington Cardiothoracic Surgery, Inc., for the possible surgical replacement of her defective mitral valve. Dr. Setser was an employee of Huntington Cardiothoracic Surgery, Inc., at the time of his treatment of Ms. Toler.

Dr. Setser first saw Ms. Toler in his office on September 15, 1999. After reviewing her records and evaluating her condition, Dr. Setser recommended that Ms. Toler undergo a mitral valve replacement due to the fact that without the surgery, Ms. Toler's prognosis for survival was poor, and there were no other medical options to effectively treat her condition. Dr. Setser explained the risks associated with the procedure to Ms. Toler, including bleeding, stroke, heart attack, lung or kidney failure, and possible death, and she consented to the surgery. Ms. Toler was scheduled for surgery at St. Mary's Medical Center on September 24, 1999. Preoperatively, Dr. Setser ordered a chest x-ray to determine whether there were any anatomical abnormalities that would contraindicate a sternotomy, the surgical separation of the sternum or breast bone, the most common surgical approach to mitral valve replacement now and in 1999. Dr. Setser planned to open the sternum surgically by making a surgical incision through the scar left from Ms. Toler's prior surgery and then dividing the sternum after it was exposed. He reviewed the pre-operative x-ray and saw no contraindications to this approach, especially in terms of the anatomical position of the sternum relative to the aorta. The pre-operative x-ray was also read and interpreted by Dr. Roger Blake, a board certified radiologist, as normal and Dr. Blake, like Dr. Setser, saw no contraindications to the surgery based on the results of the x-

ray.[1]



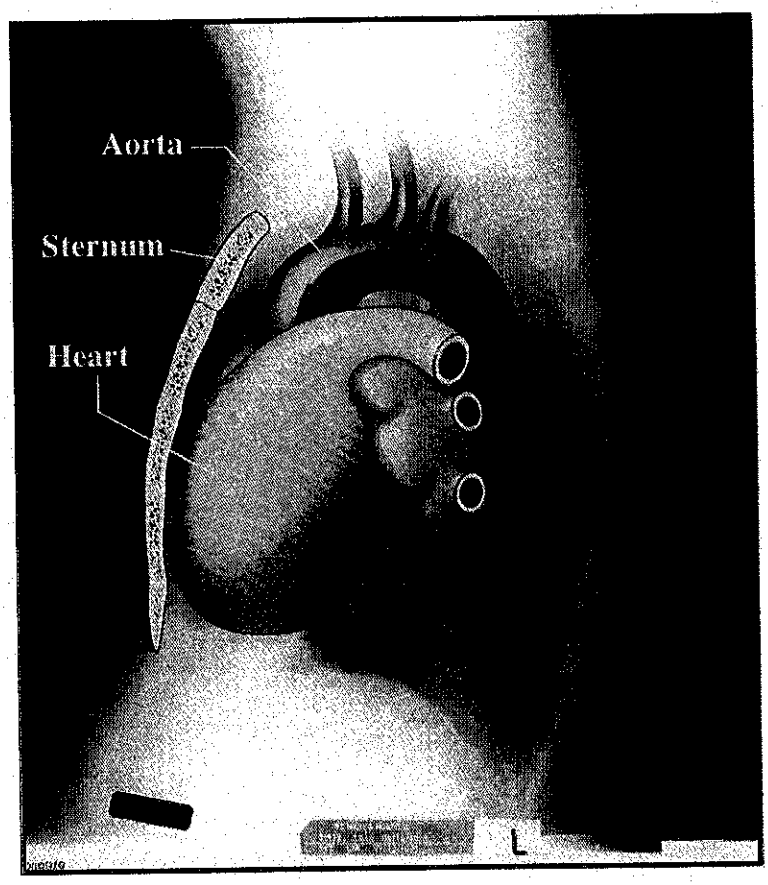

***Trial Exhibit Showing Normal Anatomy of the Thorax***

On the morning of September 24, 1999, Dr. Setser began surgery on Ms. Toler. Dr. Setser made his initial surgical incision along the scar line of the 1980 surgery. After exposing the sternum, he cut the old surgical wires that had been placed around the sternum placed during the 1980 surgery and completed the separation of the sternum with an oscillating saw. When he separated the halves of the sternum, he

[1] Dr. Blake was specifically identified as a witness by Appellees in pre-trial discovery, but the Court refused to let Dr. Blake express any opinions at trial beyond what was contained in his written radiology report because the Appellees had not provided Rule 26 disclosures to Appellant. This limitation on Dr. Blake's testimony is cross assigned by Appellees as an error.

encountered massive bleeding. This is a known complication of the procedure referred to medically as massive hemorrhage on sternal re-entry. It is a complication which can occur with any surgery that involves opening the chest cavity by separating the sternum. In cases such as Ms. Toler's, where the breast bone is being separated for a second time, the risk is increased significantly because scar tissue from the first procedure can form between the breast bone and the aorta, effectively attaching the two structures together. When the breast bone is divided surgically and separated, the scar tissue may be disturbed, potentially causing a tear or rip in the aorta. All surgeries involving the division of the sternum for a second time are classified as high risk surgeries. Some patients are subject to even greater unavoidable risks than others due to the underlying heath condition of the patient, such as prior coronary artery bypass surgery, and therefore, the high risk classification is further broken down into "low" high risk, "medium" high risk and "high" high risk categories. All of the experts who testified at trial, including Dr. Setser, agreed that Ms. Toler fell in the "low" high risk category for this surgery, because she did not have an underlying medical condition that placed her in a higher level of risk category such as prior coronary artery bypass surgery, presence of an aortic aneurism or anatomical abnormalities of the heart or aorta.

Faced with the massive hemorrhage, Dr. Setser was able to quickly identify that the source of the bleeding was a tear in the aorta, a known complication of this procedure. With the help of other surgeons who were in nearby operating rooms and his partner, Dr. Jeffrey George, Ms. Toler was quickly placed on heart by-pass in order




**LATERAL CHEST X-RAY**

***Trial Exhibit Showing Ms. Toler's Pre-Operative Chest X-Ray With Relative Positions of the Heart, Sternum and Aorta Highlighted by the Use of an Overlay.***

to provide oxygen to her brain and vital organs, and the laceration was repaired and the mitral valve was replaced. Unfortunately, after the surgery, it became apparent that the massive bleeding from the tear in the aorta caused Ms. Toler to suffer a deprivation of oxygen to her brain for an extended period of time, which resulted in irreversible brain damage.

After remaining as a patient for several weeks at St. Mary's in intensive care, Ms. Toler ultimately was transferred to a nursing home where she remained for some

time before being placed in other similar facilities, where she remained in a semi-comatose state until her death in January, 2003. This lawsuit was filed in 2001 by her son, Richard Toler, and husband, Pondy Toler, on behalf of the Estate of Julia Toler, alleging that Dr. Setser and Huntington Cardiothoracic Surgery, Inc.,[2] were negligent in the performance of the surgery on Ms. Toler.[3] Pondy Toler died during the course of the litigation and Michelle Jones, Ms. Toler's daughter, was substituted as Administratrix of the Estate. The Appellant initially identified Dr. Alex Zakharia, a thoracic and cardiovascular surgeon from Miami, Florida, as a medical expert to give opinions about the care rendered to Ms. Toler by Dr. Setser. Dr. Zakharia was deposed by counsel for Appellees in 2004. Dr. Zakharia, who had also been retained as an expert by Appellant's counsel in at least two other cases, was critical of Dr. Setser's care in the case after Ms. Toler's hemorrhage occurred. In particular, Dr. Zakharia was of the opinion that Dr. Setser deviated from the standard of care by failing to go immediately to the site of the rupture in the aorta in an attempt to control the bleeding and in his failure to initially place the cannulas for the heart lung bypass machine in the proper location in Ms. Toler's femoral vein. Dr. Zakharia had no criticisms of Dr. Setser's surgical workup or the surgery itself prior to the time of the hemorrhage. Also,

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[2] No independent claims of negligence were made against the corporate employer of Dr. Setser. It was a defendant based on a theory of vicarious liability only.

[3] St. Mary's Medical Center was also sued by the Estate, claiming that Ms. Toler developed pressure sores during her extended stay at that facility following her surgery due to the negligence of the nursing staff. That claim was later dropped after some discovery was completed and St. Mary's was dismissed as a defendant in the suit prior to trial.

he was not critical of Dr. Setser's decision not to expose Ms. Toler's femoral artery and vein prior to opening her chest to give quicker access to those structures in the event she needed to be place on heart lung bypass, nor was he critical of the decision not to actually place her on heart lung bypass prior to opening the sternum.

The case was set for trial in early 2007. Prior to the scheduled trial date, the Respondent's expert, Dr. Zakharia, was indicted by a federal grand jury in Detroit, Michigan, for perjury, mail fraud and wire fraud. The criminal indictment alleged that Dr. Zakharia gave false testimony as medical expert in medical malpractice cases from 2001 - 2003. Appellant's counsel immediately moved to drop Dr. Zakharia as an expert and name a new expert. That motion was granted and a new scheduling order was entered by the Court.

The Appellant then named Dr. Steven Herman, a thoracic and cardiovascular surgeon from New York as an expert. Like Dr. Zakharia, Dr. Herman has been used by the Masters firm as an expert in numerous other medical malpractice cases. Dr. Herman was deposed by Appellees' counsel and his opinions differed radically from Dr. Zakharia's opinions. Dr. Herman was not critical of Dr. Setser's response to the massive hemorrhage which occurred when he divided the sternum. Dr. Herman's main criticism was that he believed the pre-operative chest x-ray did not demonstrate adequate space between the sternum and aorta and that Dr. Setser should have performed a pre-operative CT of the chest to get a more definitive assessment of Ms. Toler's anatomy. He opined that the CT would have shown inadequate space between

the sternum and aorta and that Dr. Setser would have either placed Ms. Toler on heart lung bypass prior to opening the sternum or, at a minimum, exposed the femoral artery and vein so she could be placed on heart bypass quicker if a complication developed, making it less likely that she would have suffered brain damage.[4]

In light of the new theory of liability against Dr. Setser, the Appellees also retained a new expert, Dr. Karl Krieger, Chairman of the Department of Cardiovascular Surgery at New York Presbyterian - Cornell Medical Center, recognized as one of the top ten heart surgery centers in the country in 2007 by U.S. News and World Reports. Unlike Dr. Zakharia and Dr. Herman, Dr. Krieger had never appeared as a retained expert in any medical malpractice case prior to agreeing to testify on behalf of Dr. Setser. Dr. Krieger disagreed with Dr. Herman's criticisms and opined in deposition and at trial that Dr. Setser met the standard of care in his treatment of Ms. Toler.

Dr. Krieger was of the opinion, like Dr. Setser, that the pre-operative x-ray of Ms. Toler demonstrated adequate space between her sternum and aorta. Like Dr. Setser, he also believed that the tear in her aorta was due to the disruption of scar tissue that had formed between the aorta and sternum following her 1980 open heart surgery which would not be visible on an x-ray or CT scan. Dr. Krieger testified that

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[4] It was also learned for the first time at Dr. Herman's discovery deposition that he had been a patient of the defense expert, Dr. Karl Krieger, and that Dr. Krieger had performed open heart surgery on Dr. Herman. The Appellant made a motion *in limine* prior to trial to prohibit the jury from being told of this fact, which was granted by the Court. Dr. Herman did acknowledge at trial that Dr. Krieger was a highly qualified physician and well respected in his field of cardiovascular surgery.

Dr. Setser did an adequate pre-operative workup, properly opened the chest cavity and properly responded to the massive hemorrhage which occurred when he separated the sternum. Dr. Krieger explained to the jury that Ms. Toler's surgery was high risk due to her prior open heart surgery and that there were risks associated with any action that Dr. Setser might have chosen to take with regard to trying to anticipate and deal with a possible hemorrhage. In response to Dr. Herman's criticism that Dr. Setser should have performed a pre-operative CT Scan, Dr. Krieger explained that the CT Scan would not have shown scar tissue and would not have given Dr. Setser any useful information beyond what he had already learned from his pre-operative workup, including the chest x-ray. Dr. Krieger explained that a catastrophic hemorrhage can occur in any open heart procedure and that the standard of care requires physicians to recognize and respond quickly when the complication occurs, exactly in the manner as Dr. Setser did in Ms. Toler's case.

Dr. Krieger also explained that the other pre-operative procedures recommended by Dr. Herman - exposing the femoral artery and vein in anticipation of placing Ms. Toler on heart lung bypass more quickly, or actually placing her on heart lung bypass prior to opening the chest cavity - had their own associated inherent risks. He explained that exposing the femoral artery and vein did little in reducing the time it took to place a patient on heart bypass and increased the risk of infection. He explained that placing the cannulas in the femoral artery and vein prior to opening the chest cavity carries the risk of dissecting the artery causing almost certain death.

Finally he explained that placing Ms. Toler on heart bypass prior to opening her chest cavity exposed her to the risk of stroke due to blood clots being released into her blood stream due to the reversal of the normal blood flow, and made the heart valve replacement surgery much more difficult to perform by the surgeon due to decreased visibility as a result of a bloody surgical field.

Trial began on May 19, 2008 with the selection of a seven person jury.[5] Consistent with the opinions of Dr. Krieger and the testimony of Dr. Setser, Appellants' theory of defense was that the complication that unfortunately occurred in Ms. Toler's case was a recognized risk of her high risk surgical procedure that could neither be predicted in advance or prevented. Contested issues at trial all revolved around the appropriate standard of care and whether Dr. Setser complied with that standard. The ultimate issue that the jury had to determine was whether the brain injury suffered by Ms. Toler the result of negligence on Dr. Setser's part or the result of a known complication of her surgical procedure that was not predictable or preventable by Dr. Setser. The jurors heard opinion testimony from four experts during the course of the trial, Dr. Herman, Appellant's retained expert, Dr. Krieger, Appellees' retained expert, Dr. Setser and Dr. George. After four days of testimony the jury was given a standard jury charge by Judge Cummings on the law of medical malpractice in West Virginia. The Court's jury charge instructed the jury, in part, that under the law of West Virginia, Dr. Setser was not a guarantor of favorable

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[5] By agreement of counsel, the Court did not select an alternate juror and all seven chosen jurors deliberated to a unanimous verdict.

results from the surgery. The jury was also instructed that bad or unexpected results from the surgery, standing alone, were not evidence of negligence and that negligence could not be inferred from the injury suffered by Ms. Toler. Judge Cummings instructed the jury that Dr. Setser could only be found liable for Ms. Toler's injuries and subsequent death if the jury found by a preponderance of the evidence that he deviated from the applicable standard of care and the deviation was a proximate cause of her injuries and subsequent death. Appellees' counsel argued in closing arguments that all of the options laid out by Appellant's expert that should have been taken by Dr. Setser in order to comply with the medical standard of care carried unavoidable risks making Dr. Setser potentially been subject to criticism no matter what course he chose to follow if a bad outcome occurred as a result of a known risk of the selected procedure. When Appellees' counsel used a cartoon from a local newspaper to illustrate this point, Appellant's counsel objected and the Court sustained the objection.


***Cartoon Used by Appellees' Counsel in Closing Argument***

Counsel for Appellees moved immediately to other arguments. While counsel argued that Dr. Setser could potentially have been criticized by Appellant if Ms. Toler had suffered an injury as the result of a known risk of any of the alternative procedures suggested by Appellant's expert, Dr. Herman, counsel for Appellant made a general objection which was overruled by the Court. Counsel then finished closing arguments and no further objections were made during the closing, nor did counsel for Appellant move for a curative instruction from the Court at any time before the jury began its deliberations.

After retiring to the jury room and deliberating for approximately 25 minutes, the jury foreperson submitted a written question to the Court concerning how the jury was to return its verdict. After the Court responded in writing, the jury returned a unanimous verdict a few minutes later, finding Dr. Setser did not deviate from the applicable standard of care in his treatment of Ms. Toler. During the time the jury deliberated, counsel for Appellant moved for a mistrial, arguing that the cartoon used in closing by Appellees' counsel, coupled with other remarks made later in closing about the quality of medical care in the Huntington community, was improper and in violation of the Court's order granting one of Appellant's motions *in limine*, that no arguments be made at trial about a medical malpractice crisis. That motion was unopposed by Appellees and counsel's closing argument in no way violated the trial Court's order as shown by the transcript of the closing arguments. As reflected in the trial transcript, counsel's closing was based solely on the defense theme as expressed

throughout the trial – Ms. Toler's injuries and death were the result of an unpredictable and unpreventable complication of her high risk surgery, not negligence on the part of Dr. Setser.

## IV. STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals reviews the rulings of the circuit court in granting or denying a new trial and its conclusions as to the existence of reversible error under an abuse of discretion standard, and reviews the circuit court's underlying factual findings under a clearly erroneous standard. Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995). Questions of law are subject to *de novo* review. Id. This Court has held that "rulings on the admission of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard." Sydenstricker v. Mohan, 217 W. Va. 552, 557, 618 S.E.2d 561, 566 (2005). Additional standards for review that are pertinent to the specific issues raised are discussed in connection with the matters to which they relate.

## V. ARGUMENT

This Honorable Court must affirm the decision below because the trial court properly ruled that Appellant's motion *in limine* had not been violated and Plaintiff was not entitled to a new trial because any alleged improper closing argument was harmless.

### A. This Court Must Affirm the Judgment Below Because the Circuit Court Properly Denied the Appellant's Motion for a New Trial Premised on an Alleged Violation of a *Motion in Limine.*

This Court has held that a trial court's ruling on a *motion in limine* violation is reviewed on appeal for an abuse of discretion. McKenzie v. Carroll Int'l Corp., 216 W. Va. 686, 690, 610 S.E.2d 341, 345 (2004).

### 1. The Judgment Below Must be Affirmed Because Appellant Waived Her Objection by Not Requesting a Curative Instruction.

This Honorable Court has repeatedly held that "a party's failure to make a timely objection to improper closing argument, and to seek a curative instruction, waives the party's right to raise the question on appeal." Rowe v. Sisters of Pallottine Missionary Society, 211 W. Va. 16, 26 n.6, 560 S.E.2d 501 n.6 (2001) (*citing* Yuncke v. Elker, 128 W. Va. 299 syl. pt.6, 36 S.E.2d 410 (1945); McCullough v. Clark, 88 W. Va. 22 syl. pt.6, 106 S.E. 61 (1921)); Skibo v. Shamrock Co., Ltd., 202 W. Va. 361, 365, 504 S.E.2d 188, 192 (1998) (stating that "**this court will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks**") (*citing* Mcullough v. Clark, 88 W. Va. 22 syl. pt.6 (1921); Pasquale v. Ohio Power Co., 187 W. Va. 292, 418 S.E.2d 738 (1992)) (emphasis added); *see also* State v. Guthrie, 205 W. Va. 326, 336, 518 S.E.2d 83, 93 (1999) (stating that in order to take advantage of improper closing argument a party **must object at trial and move for a curative instruction**) (*citing* State v. Lewis, 133 W. Va. 584, 608, 47 S.E.2d 513, 528 (1949) (emphasis added).

In his concurring opinion in Rowe, Chief Justice McGraw confirmed that it has long been the law in West Virginia that the requirement that a party must request a

curative instruction to remedy alleged improper closing argument or that party has waived its objection applies whether or not a prior *in limine* ruling has been made:

> Our statement in Lacy v. CSX Transportation, Inc., [ ]—that **objections during closing arguments are "disfavored" where the challenging party has already sought and obtained a ruling *in limine* on an anticipated line of argument—did nothing to alter these requirements.**
>
> Appellant could have made a timely objection to appellee's closing argument, as was apparent by appellant's lone objection to another comment made at trial. Appellant chose to wait until after appellee completed his initial closing, and then appears to have only made an objection. Appellant did not seek an instruction to the jury to disregard the remark—instead, the record may be read to suggest that appellant waited until after the jury retired to deliberate to ask the circuit court for a mistrial.
>
> On this record, the majority properly refused to examine the effect this remark by appellee's counsel may have had upon the jury's deliberations.

Rowe, 211 W. Va. at 29, 560 S.E.2d at 504 (McGraw, C.J., *concurring*) (emphasis added) (internal citations omitted).

In the present case, Appellant waived her objections to the presentation of the cartoon and the alleged improper closing comments because, although she raised an objection on the issue, she failed to request an appropriate curative instruction as required by West Virginia law. Consequently, this Honorable Court **must affirm** the judgment of the trial court below.

### 2. Even If Appellant Did Not Waive Her Objection, This Court Must Still Affirm Because Appellant's Motion *in Limine* Was Not Violated.

For a "violation of an *in limine* motion to serve as the basis for a new trial, the order must be specific in its prohibitions, and violations must be clear." Honaker v.

Mahon, 210 W. Va. 53, 61, 552 S.E.2d 788, 796 (2001). For example, in Honaker, this Court awarded a plaintiff a new trial where the defendant clearly violated a pre-trial motion *in limine* excluding "[t]he time or circumstances under which plaintiff employed an attorney" by asking "leading questions about the plaintiff's employment of an attorney, when 'her husband is just barely in the ground.'" Id. at 59, 62.

Unlike Honaker, the judgment below must be affirmed in this case because there was no clear violation of the *in limine* order. Appellant contends that Appellees violated the circuit court's Order Regarding Plaintiff's Motions in Limine to exclude argument "about a medical malpractice litigation crisis, or that cases such as plaintiffs' are the reason why the courts are clogged or causing problems with the court system." *See* May 19, 2008 Order Regarding Plaintiff's Motions In Limine, ¶ 9. Specifically, Appellant contends that Appellees violated the motion in limine in two ways: first, by displaying a newspaper clipping of the "Wizard of Id" cartoon, which ran in the Thursday, May 22, 2008 Herald Dispatch newspaper in Huntington, West Virginia, where the case was being tried, depicting a fortune teller informing the wizard that his deceased uncle wants him to sue the uncle's doctor; and second, by making certain arguments in closing stating, in effect, that Plaintiffs would likely have criticized Dr. Setser's actions in this case no matter what course of action he took, even if the medical procedures employed were properly performed, if the chosen course of treatment ultimately ended in a bad result. Br. of Appellant, 1-4.

The *in limine* order in the present case clearly prohibited two things: (1) evidence regarding the medical malpractice litigation crisis, and (2) evidence regarding

problems with the court system as a result of medical malpractice litigation. First, it is undisputed that neither the cartoon nor the statements made by Appellees' counsel touched the prohibition against discussing any problems there may be with the court system as a result of medical malpractice litigation. Second, it cannot reasonably be argued that the cartoon or any comments or statements made by the Appellees "clearly" violated the prohibition against presenting evidence regarding the "medical malpractice litigation crisis." Importantly, the medical malpractice litigation crisis refers to the cumulative impact of medical malpractice claims **upon the healthcare system** due to excessive litigation, excessive jury awards, and a lack of state regulation. *See* W. Va. Code § 55-7B-1.

The cartoon and comments complained of by Appellant made absolutely no reference to any impact medical malpractice claims may have on the healthcare system. Rather, they conveyed Appellees' **theory of the case** that the Appellees were essentially placed in a damned-if-you-do, damned-if-you-don't situation: meaning that high risk procedures are further categorized into "high" high risk, "moderate" high risk, and "low" high risk, each of which carries its own set of individualized risks because of the specialized procedures associated with that category.[6] Ms. Toler was categorized

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[6] Procedures performed on patients falling into the "medium" and "high," high risk categories generally warrant additional procedures not associated with procedures performed on patients falling into the "low" high risk category, including femoral catheterization and heparinization prior to surgically opening the chest to replace a heart valve. Both of these additional procedures carry their own set of risks.

Femoral catheterization requires making an incision in the groin area. This incision carries a five-percent chance of infection. Once the incision is made, a catheter is then inserted into the femoral artery of the leg and guided through the arteries up to the heart. The catheterization itself caries a risk of transecting the artery, which may result in death, loss

as a "low" high risk because she did not have any of the additional risk factors that would have placed her into a higher category.[7] Appellees' theory is that no matter what course of action Dr. Setser chose in treating Ms. Toler, whether utilizing the procedures associated with either the "moderate" high risk or the "high" high risk categories, or the procedures associated with the "low" high risk category, which he actually used, he would potentially be criticized if it results in a bad outcome: if he utilized the procedures associated with either "moderate" or "high" high risk categories, he would be criticized for performing unnecessary procedures; or if, as in the present case, he utilized the procedures associated with the "low" high risk category, he would be criticized for not employing additional procedures. Appellees' theory is illustrated in the Powerpoint slide presented in closing by Appellees and included on page 3 of Appellants' Brief:

> "Dr. Setser Can't Win. No Matter What Course He Takes, There Are Going to Be Potential Life Threatening Complications That Can Not Be Avoided. If One of Those Complications Occur, He is Going to be Criticized For Not Taking the Other Course."

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of a limb, blood clotting, and strokes from the blood clotting.

Heparinization is generally required when performing a femoral catheterization because of the risk of blood clotting. Heparinization thins the blood, causing a bloody surgical field. As a result of heparinization, bleeding at the surgical site is difficult to control and the surgeon generally ends up performing the surgery in a bloody field with limited visibility. Consequently, injury to the heart and great vessels is greatly increased when a femoral catheterization is performed.

[7] Factors that serve to elevate a patient from a "low" high risk category to a "medium" high or "high" high risk category include prior coronary artery surgery, presence of an aortic aneurism, and anatomical abnormalities of the aorta or heart. Ms. Toler did not present with any of these factors.

In essence, the statements and cartoon complained of by Appellant conveys the simple truth that hindsight is always perfect: meaning that it is easy for a patient's family to criticize the professional judgment of a doctor when a medical procedure results in a bad outcome, such as in the present case; and also that because the technological and scientific advancements in medicine have made such complications very rare, it is natural for many patients and their families to believe that any bad outcome must be the result of the doctor doing something wrong. Clearly, however, Appellees' theory and the simple recognition of hindsight, as presented in Appellees' closing argument, does not violate Appellant's *in limine* motion because it does not in any way make reference or implicate the impact that medical malpractice claims may have upon the healthcare system due to excessive litigation, excessive jury awards, or a lack of state regulation. Therefore, this Honorable Court must affirm the judgment below.

### 3. Even if Appellant's Motion in Limine Was Violated, The Judgment Below Must Still be Affirmed Because Any Such Violation Was Inadvertent and Not Reasonably Calculated to Cause a Rendition of an Improper Verdict.

In determining whether a jury's verdict may be set aside due to a violation of an *in limine* ruling, this Honorable Court has held that "a court should consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent." Honaker, 210 W. Va. at 61, 552 S.E.2d at 796. This Court has further stated that a court should consider the inflammatory nature of the violation as to whether a substantial right of

the party seeking to set aside the jury's verdict was prejudiced and that "[t]he violation of the court's ruling **must** have been reasonably calculated to cause, and probably did cause, the rendition of an improper judgment." Id. (emphasis added).[8] For example, in Honaker, this Court found that the plaintiff was entitled to a new trial because the evidence overwhelmingly demonstrated, and counsel for the defendant admitted, that the defendant clearly violated the court's *in limine* order by asking leading questions directly and unquestionably prohibited by the motion *in limine*. Id. at 61-62. Moreover, this Court found that the manner in which the questions in Honaker were posed was inflammatory and the violation was reasonably calculated to, and likely did, cause the rendition of an improper judgment because they were designed to focus the jury's attention on a collateral issue that was wholly irrelevant to the issues in the case. Id.

Unlike the intentional conduct of defense counsel in Honaker, if Appellees' closing statements or display of the cartoon complained of by Appellant did violate the motion *in limine*, it was unintentional and inadvertent. As discussed in Section A.2., *supra*, Appellees were merely attempting to convey their theory of the case by illustrating to the jury the damned-if-you-do, damned-if-you-don't situation Dr. Setser was placed in, given the inherent risks of the procedure, the fact that a know risk occurred during the procedure, and the unreasonable belief of the Appellants that the

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[8] Additional factors a court may consider in determining whether to set aside a jury verdict for violation of an *in limine* order include the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources. Honaker, 210 W. Va. at 61, 552 S.E.2d at 796. However, there is no evidence that the issues presented for appeal in this case confused the jury, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources.

inherent risk that occurred was due to an error on the part of the surgeon. Moreover, there was nothing inflammatory about the manner or content of the cartoon or statements presented in the closing argument. As the transcript proves, defense counsel showed a slide of the cartoon in the normal course of his closing argument and as soon as Appellant's counsel objected, defense counsel closed the slide and moved on with the rest of his argument. Transcript of Closing Arguments, p. 29-30.

Additionally, in contrast to Honaker, it is extremely unlikely that the alleged violation of the motion *in limine* in this case caused a rendition of an improper judgment because the cartoon and statements complained of were unquestionably relevant to Appellees' theory of the case, they were presented in an innocuous manner, they were presented before Appellant's rebuttal, and the amount of time in which they occupied the jury's attention was so minuscule that no reasonable person could believe that they prejudicially swayed the decision-making process of the jurors. Thus, this Honorable Court must affirm the judgment of the trial court even if there was a violation of the *in limine* order because any such violation was inadvertent, non-prejudicial, non-inflammatory, not reasonably calculated to cause prejudice, and unlikely to cause a rendition of an improper verdict.

B. **This Court Must Affirm the Judgment Below Because Appellees' Closing Argument Was Well Within the Acceptable Boundaries Permitted by Law.**

In Farmer v. Knight, this Honorable Court held that

> The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been

prejudiced, or that manifest injustice resulted therefrom.

207 W. Va. 716, 722, 536 S.E.2d 140, 146 (2000) (per curiam) (*quoting* State v. Boggs, 103 W. Va. 641, 138 S.E. 321, 322 (1927). In Crum v. Ward, this Court stated that although facts, and inferences drawn from facts, not in the record are not permitted, "wide latitude and freedom of counsel in arguments to a jury are and ought to be allowed." 146 W. Va. 421, 435, 122 S.E.2d 18, 26-27 (1961); *see* C.W. Development, Inc. v. Structures, Inc. of W. Va., 185 W. Va. 462, 467, 408 S.E.2d 41, 46 (1991) (per curiam) ("wide latitude and freedom of counsel in arguments to a jury are and ought to be allowed"); Farmer, 207 W. Va. at 722, 536 S.E.2d at 146 ("great latitude is allowed counsel in argument of cases"); State v. McCracken, 218 W. Va. 190, 196, 624 S.E.2d 537, 543 (2005) (counsel has great latitude in presenting closing argument and should not be unduly restricted). Importantly, jurisdictions in the United States universally take the position that counsel has wide latitude in closing argument. *See, e.g.*, Tennessee v. Chearis, 2008 WL 3342989 (Tenn. Crim. App. 2008 (slip copy) (counsel for both sides have wide latitude in what is presented to the jury in closing); People v. Harrison, 1106 P.3d 395 (Cal. 2005) (counsel has wide latitude in closing argument); Brewer v. Mississippi, 704 So.2d 70 (Miss. 1997) (counsel has wide latitude in closing argument to present illustrations, etc.).

In accordance with the "great" latitude afforded counsel in closing argument, courts generally permit quotes from the Bible, readings from poetry or prose, recitations of child prayers, hand drawn pictures, charts, cartoons, stories, and jokes to illustrate a point or convey their theory of the case even though the illustration may

not be in evidence. State v. Keesecker, 222 W. Va. 139, 663 S.E.2d 593 (2008) (this Court refused to apply plain error to reverse verdict where prosecutor made numerous quotes and illustrations from Bible); State v. McCracken, 218 W. Va. 190, 624 S.E.2d 537 (this Court refused to reverse conviction in child murder case where prosecutor recited child's prayer because such was not prejudicial and did not result in manifest injustice); People v. Wilson, 2007 WL 2377324 (Cal. App. 2007) (not reported) (stories, jokes, Bible readings, and illustrations are all generally acceptable for closing arguments); People v. Riggs, 44 Cal.4th 248 (2008) (counsel can use a chart of jury responses or generally read from a book or other source in closing arguments as illustration even though not in evidence); Schwamb v. Delta Airlines, Inc., 516 So. 2d 452 (La. App. 1988) (although not in evidence, counsel can generally use aids such as cartoons blackboards, charts, sketches, and drawings to demonstrate or illustrate theory of case or principle in closing argument). In Brewer v. Mississippi, the Supreme Court of Mississippi stated that

> Counsel may draw upon literature, history, science, religion and philosophy for material for his argument[; h]e may navigate all rivers of modern literature or sail the seas of ancient learning; he may explore all the shores of thoughts and experiences[; and t]he Court should be very careful in limiting free play of ideas, imagery, and personalities of counsel in their argument to jury.

704 So.2d 70, 73 (1997) (en banc).

**1. The Judgment Below Must be Affirmed Because the Statements and Cartoon Complained of Did Not Prejudice the Appellant or Result in Manifest Injustice.**

This Court has recognized that comments and illustrations used to convey

counsel's theory of the case or to illustrate a relevant point are generally not prejudicial and do not rise to the level of manifest injustice. Farmer, 207 W. Va. at 722, 536 S.E.2d at 146 . In Farmer, defense counsel stated the following in closing argument:

> I think [the plaintiff has] been victimized by the system, by her boyfriend, by her family, by her attorney. This is a made up case with regard to the head injury.

Id. at 721. After a review of the record, this Court affirmed the trial court's ruling denying the plaintiff a new trial because "the comments made by the [defense] counsel were obviously meant to convey the [defendants'] **theory of the case**." Id. at 722 (emphasis added).

A review of decisions from other jurisdictions reveals that they take the same position: that statements and illustrations conveying a party's theory of the case or illustrating a relevant point and presented during closing argument generally will not be prejudicial or rise to the level of manifest injustice. For example, in People v. Harrison, the Supreme Court of California held that it was not prejudicial to the defendant where, in addition to numerous instances of referring to the defendant as such things as a "habitual killer," "denizen of the night,""prowler," a byline killer, and a "disciple of Satan," the prosecutor likened the defendant to the Anti-Christ in the Book of Revelation coming to "cut a path through the city of Oakland leaving murder and death and destruction and utter annihilation in his wake." 35 Cal.4th 208, 247 (2005). In Brewer v. Mississippi, the Supreme Court of Mississippi found non-prejudicial the projection of a prosecutor's hand drawn picture of The World Trade Center during closing argument where the defendant was charged with unlawful

possession of explosive materials, mainly common fertilizer, because the picture illustrated the ease by which certain common materials may be converted into dangerous instrumentalities. 704 So.2d at 77-73.

Similar to Harrison and Brewer, the cartoon and closing statements made by counsel for Appellees in this case were designed to merely convey and illustrate to the jury the position that Dr. Setser was placed in and Appellees' theory of the case. As previously stated, hindsight is always perfect and the expectations of patients and their families regarding a perfect result from medical treatment today is highly driven by the significant advancements in science and technology made in recent years making serious complications a rare occurrence. As such, sometimes the fulfillment of a patient's, or his or her family's, expectations are outcome determined: meaning that in the event medical treatment results in a bad outcome, the patient and/or his or her family automatically conclude that the healthcare provider was negligent. That is what happened in this case. Dr. Setser was placed in a damned-if-you-do, damned-if-you-don't scenario: no matter what course of action he chose, if the treatment resulted in a bad outcome he would be criticized.

In addition, the use of cartoons to illustrate points or theories in closing argument is not unusual or improper or prejudicial in and of itself. For example, in Schwamb v. Delta Airlines, Inc., 516 So.2d 452, 463-64 (La. App. 1987), the plaintiff was injured when a briefcase fell out of the overhead luggage department and hit him in the head. In closing argument, plaintiff's counsel showed the jury a cartoon, not admitted into evidence, taken from Newsweek magazine depicting a suitcase falling

from an overhead airplane luggage compartment onto a seated business woman and captioned, "My Financial Partner? New England Life, of Course. Why?" to demonstrate how Delta should have foreseen the danger presented by overstuffed or improperly loaded overhead luggage bins. Id. At another point in closing argument, plaintiff's counsel remarked that Delta was "counting on cheap justice in Tangipahoa Parish." Id. The court found that although counsel's presentation of the cartoon and remarks may have been improper, under the facts of the case they did not justify granting a new trial. Id.

Similar to Schwamb, Appellees' statements and presentation of the cartoon complained of during closing arguments in the present case were not unusual and do not warrant the grant of a new trial. As already stated, the cartoon and statements were presented to merely convey Appellees' theory of the case and the position Dr. Setser was placed in. In addition, the amount of time in which the statements and cartoon occupied the jury's attention was minuscule and the manner in which they were presented was innocuous.

Moreover, given the measure of latitude and freedom West Virginia courts have allowed counsel during closing arguments, this Court has been highly deferential to the rulings of trial courts because of their position to see and hear the arguments complained of. C.W. Develop. Inc., 185 W. Va. at 467, 408 S.E.2d at 46 (*citing* Board of Educ. Of McDowell County v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 390 S.E.2d 796, 811 (1990) (recognizing that the trial court has discretion in determining when counsel's comments require a new trial)). Other courts employ this same level of

deferential review to closing arguments. For example, in Schwamb v. Delta Airlines, Inc., the court observed that the "propriety of counsel's closing argument must be determined in the light of the facts of the particular case, the conduct and atmosphere of the particular trial, and the arguments of opposing counsel." 516 So.2d at 463-64. In the present case, although the trial court sustained Appellant's objection to the presentation of the cartoon, the court denied Appellant's motion for a new trial. In rendering its ruling, it is obvious that the trial court determined that neither the comments nor the cartoon presented by Appellees in closing argument and complained of by Appellant were prejudicial to the Appellant's rights or caused the jury to render an improper judgment resulting in manifest injustice. The trial court was in the best position to observe the conduct and atmosphere of the trial in this case and there is nothing in the record to indicate that the trial court abused its discretion. Therefore, this Honorable Court must affirm the decision below because even if the cartoon and comments were improper, they did not result in prejudice to the Appellant's rights or cause the rendition of an improper verdict.

### 2. The Judgment Below Must Be Affirmed Because Appellant Waived Her Objection to the Statements and Cartoon Complained of by Failing to Request a Curative Jury Instruction.

As stated in Section A.1., *supra*, this Honorable Court has repeatedly held that **"a party's failure to make a timely objection to improper closing argument, and to seek a curative instruction, waives the party's right to raise the question on appeal."** Rowe v. Sisters of Pallottine Missionary Society, 211 W. Va. at

26 n.6, 560 S.E.2d at 501 n.6; see also Section A.1., *supra*. It is uncontested that Appellant did not request a curative instruction to remedy the alleged effects of the statements and comments made by Respondent. Therefore, this Honorable Court must affirm the decision below because Appellant failed to request a curative instruction as required by West Virginia law.

Although acknowledging that she did not request a curative instruction, Appellant contends that the effects of the statements and cartoon presented by Respondent could not have been cured by an appropriate jury instruction because of their prejudicial nature. Br. of Appellant, p. 17. However, other than the empty claim that the statements and cartoon were prejudicial, Appellant offers no rationale or analysis demonstrating why the effects, if any, of the statements and cartoon complained of could not have been cured by an appropriate jury instruction. Moreover, Appellant offers no valid reason for not requesting such an instruction. Simply put, Appellant is unhappy with the result below, so seeks a second bite at the apple. The law in West Virginia is clear: a party's failure to make a timely objection **and seek a curative instruction waives the party's right to raise the question on appeal.** Rowe, 211 W. Va. at 26 n.6, 560 S.E.2d at 501 n.6; see also Section A.1., *supra*. Because Appellant failed to seek a curative instruction, this Honorable Court must affirm the judgment below.

### 3. The Judgment Below Must Be Affirmed Because Appellant Simply Failed to Establish That Appellees Breached The Standard of Care.

This Honorable Court has made it patently clear that "an appellate court will

not set aside the verdict of a jury, founded on conflicting testimony and approved by the trial court, unless the verdict is against the plain preponderance of the evidence." Sydenstricker v. Mohan, 217 W. Va. at 557, 618 S.E.2d at 566. In Stenger v. Hope Natural Gas Co., 141 W. Va. 347, 90 S.E.2d 261 (1955), this Court held that in reviewing a case wherein a jury verdict has been rendered, it is the duty of the reviewing court to treat the evidence as being favorable to the verdict. Appellant contends that she is entitled to a new trial because the statements and cartoon presented by Appellees during closing argument prejudiced the jury. However, such a conclusion is untenable. As already noted above, the trial court ruled on Appellant's objections and denied her motion for a new trial. In doing so, the trial court necessarily ruled that the statements and cartoon were not prejudicial to the Appellant's rights and did not cause the jury to render an unjust verdict.

The fulcrum of the trial of this case rested on the standard of care. The standard of care was hotly debated throughout the trial and during closing arguments. Both parties presented expert testimony regarding the standard of care and, specifically, whether the standard of care required a CT scan in this case. The Appellant attempted to establish by expert testimony that a CT scan was required; the Appellees presented evidence and expert testimony that a CT scan was not required. The jurors were charged that they "were the sole judges of the credibility of the witnesses and the weight of their testimony"; that a health care provider is "not required to exercise the highest degree of skill and diligence possible in the treatment of an injury, but is required to possess and exercise that degree of learning, skill and diligence and care

ordinarily used and possessed by a health care provider . . . under the same or similar circumstances"; that a health care provider is "not a guarantor of favorable results"; and that "[b]ad or unexpected results or complications standing alone are not evidence of negligence on the part of a health care provider." Jury Instructions, pp. 3-7.

After receiving the jury instructions, the jury retired to the jury room, where it deliberated for a mere forty-five minutes before returning a unanimous defense verdict stating that the Appellant failed to establish a breach of the standard of care. Signed Verdict Form, May 3, 2008, p.1. The trial court accepted the verdict and denied Appellant's motion for a new trial. The short period of time in which the jury deliberated and the trial court's denial of Appellant's motion for a new trial and acceptance of the verdict all indicate that the verdict was not "against the plain preponderance of the evidence." The logical conclusion to draw from the facts and proceedings in this case is that the jury determined that the Appellant simply failed to establish a breach of the standard of care. Therefore, this Honorable Court must affirm the decision below.

### C. Plain Error Cannot Be Used To Salvage Appellant's Case.

To the extent that Appellant argues that the complained of cartoon and closing argument rises to the level of plain error, such contention has no merit for two reasons: first, there was no plain error in this case because Appellant effectively objected to both the display of the cartoon and the statements complained of; second, Appellant has waived any error that may be found to exist by strategically declining to request a curative jury instruction.

### 1. This Court Must Affirm The Judgment Below Because Plain Error Applies Only Where A Party Fails to Object to the Complained of Error.

This Court has held that the plain error doctrine is to be utilized sparingly and only in extreme circumstances. State v. Keesecker, 222 W. Va. 139, 663 S.E.2d at 602; Keesee v. General Refuse Service, Inc., 216 W. Va. 199, 209, 604 S.E.2d 449, 459 (2004) (per curiam). To trigger plain error, this Court has explained that there must be (1) an error; (2) that is plain; (3) that affects the substantial rights of the party appealing; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Id. This Court has further stated that an "unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice." Keesecker, 663 S.E.2d at 602. Importantly, a review of cases where this Court has applied plain error generally shows that for an alleged error to be plain, it must be one where counsel has failed to object to the alleged error complained of. *See* Keesee, 216 W. Va. at 209, 604 S.E.2d at 459 (plain error applies where Appellant's counsel failed to object to alleged erroneous jury instructions); Radec, Inc. v. Mountaineer Coal Development Co., 210 W. Va. 1, 8 n.6, 552 S.E.2d 377, 384 n.6 (2000) (plain error applies where counsel failed to object to complained of error); Keesecker, 663 S.E.2d at 602 (plain error applies where counsel failed to object to complained of error).

First, in the present case it can hardly be argued that any alleged errors relating

to the issues raised on appeal in this case are "plain." As discussed above, these issues were all addressed by the trial court when Appellant objected to the complained of cartoon and closing argument during the trial and filed a motion for retrial based on the same issues. The trial court was in the best position to ascertain whether the complained of conduct was prejudicial in any way and necessarily determined that it was not, as evident by its rulings.

Second, the facts of this case demonstrate that the complained of cartoon and closing statements did not in any way seriously affect the fairness, integrity, or public reputation of the judicial proceedings of this case. As already discussed, the amount of time that the jury was exposed to the complained of cartoon and closing argument was very brief; the manner in which they were presented was innocuous; the violation of the motion *in limine*, if any, was inadvertent, and the trial court, in its discretion, sustained one of the Appellant's objections, denied one objection, and denied her motion for a new trial. All of these facts indicate that, even if plain error was somehow involved here, any error was harmless and not reversible. Therefore, this Honorable Court must affirm the decision below because there was no plain error, and even if there was, the error was harmless.

**2. In The Event Plain Error Does Exist, This Court Must Still Affirm the Judgment Below Because Appellant Invited Any Alleged Error By Strategically Declining to Request A Curative Jury Instruction.**

This Court has held that, as a general rule, a "judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Pullin

v. State, 216 W. Va. 231, 234, 605 S.E.2d 803, 806 (2004). As this court has further observed,

> "Invited error" is a cardinal rule of appellate review applied to a wide range of conduct. **It is a branch of the doctrine of waiver** which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from the error. The idea of invited error is not to [legitimize the error] but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of trial use the error to set aside its immediate and adverse consequences.

Pullin v. State, 216 W. Va. at 234, 605 S.E.2d at 806 (emphasis added) (*quoting* State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). This Court has further noted that "waiver necessarily precludes salvage by plain error review. Id. (*citing* State v. Knuckles, 196 W. Va. 416, 421, 473 S.E.2d 131, 136 (1996) (per curiam).

This Honorable Court must affirm the judgment below in the present case because Appellant invited any alleged error that may be found with regard to the cartoon and closing statements by strategically declining to request a curative jury instruction. This Court has specifically noted on several occasions that a party "cannot . . . be allowed to alter retroactively [her] trial strategy." Radec, Inc., 210 W. Va. at 8, 552 S.E.2d at 384 (*quoting* McDougal v. McCammon, 193 W. Va. 229, 239, 455 S.E.2d 788, 798 (1995). Appellant was well aware of any potential impact the cartoon and closing statements could have on the disposition of this case, as demonstrated by her objections. Yet, Appellant made a strategic decision not to request a curative jury instruction. Essentially, Appellant, now unhappy with her decision, seeks a second bite at the apple. Pursuant to West Virginia law, Appellant has effectively waived review

of this issue. Therefore, this Honorable Court must affirm the decision below.

## VI. APPELLEES' CROSS ASSIGNMENT OF ERROR

**The Trial Court Committed Reversible Error by Excluding the Testimony of Dr. Roger Blake, a Treating Radiologist Because the Testimony of a Treating Physician is Qualitatively Different From That of an Expert Hired Solely To Testify, and is Therefore Not Subject to the Same Gatekeeper Analysis as a Hired Expert.**

### A. STANDARD OF REVIEW

This Court reviews a trial court's evidentiary and procedural rulings for an abuse of discretion. Jenkins v. CSX Transportation, Inc., 220 W. Va. 721, 726, 649 S.E.2d 294, 299 (2007) (per curiam) (*citing* McDougal v. McCammon, 193 W. Va. at 229 syl. pt.1, 455 S.E.2d 788).

### B. ARGUMENT

If this Court remands this case for a new trial, it must also reverse the ruling of the trial court below which excluded the testimony of Dr. Roger Blake because Dr. Blake was a treating physician. Although this Court has not specifically ruled whether a party is required to disclose a non-retained, non-specially employed treating physician as an expert witness, it has observed that

> The testimony of a treating physician is qualitatively different from that of a physician hired solely to testify. . . . This does *not* mean . . . that we believe the practice of medicine . . . is not based on science. Rather, it means that expert evidence based on a qualified witness' own experience, observation, and study is treated differently from opinion evidence based on novel scientific principles advanced by others.

State ex rel. Wiseman v. Henning, 212 W. Va. 128, 134 n.2, 596 S.E.2d 204, 210 (2002) (per curiam). Accordingly, this Court has also recognized that because the testimony

of a treating physician is different from that of a hired expert, it is not subject to the same gatekeeper analysis of the West Virginia Rules of Civil Procedure and Evidence. Id.

A reasonable reading of West Virginia Rule of Civil Procedure 26 in light of Henning supports a conclusion distinguishing between non-hired, non-specially employed treating physicians and hired or specially retained expert witness physicians, similar to that made by many federal courts. In distinguishing treating physicians from hired or specially employed expert witness physicians under Federal Rule of Civil Procedure 26, upon which West Virginia Rule of Civil Procedure 26 is based, many federal courts have observed that a party is **not required to disclose anything more than the identity of a non-retained, non-specially employed treating physician.** Sullivan, v. Glock, Inc., 175 F.R.D. 497, 501 (D. Md. 1997); Indemnity Ins. Co. Of North America v. American Eurocopter LLC, 227 F.R.D. 421, 424 (M.D.N.C. 2005); Tompkin v. American Tobacco, Co., 2001 WL 36113662 **1-2 (N.D.Oh. 2001) (slip copy); Johnson v. City of Seattle, 2004 WL 5495251 **1-2 (W.D. Wash. 2004).

The Sullivan court observed that the distinction between treating physicians and hired or specially employed expert physicians, "often overlooked in practice, is of critical importance." Sullivan, 175 F.R.D. at 500. For example, in Sullivan, the court observed that a treating physician may testify as to anything within the scope and care of the patient, even causation, so long as the physician relies on his own evaluation, knowledge, and treatment of the patient, and not on outside reports. Id. at 501-502. The court further observed that in testifying as a treating physician, all that the party offering the testimony need disclose is the identity of the treating physician. Id. at 501.

Similarly, the Tompkin court permitted a treating physician to testify as to his own care and treatment of the patient, including his conclusions as to causation, notwithstanding the fact that the treating physician was not disclosed as an expert. Tompkin, 2001 WL 36113662 *2. The Tomkin court further observed that a non-hired, non-specially employed treating physician testifying as to his own care and treatment provided to a patient, is not an "expert" within the definition of Federal Rule of Civil Procedure 26. Id.

In the present case, the trial court erred by granting Appellant's motion to exclude Dr. Blake from testifying about anything outside of what was dictated in Dr. Blake's radiology report because, similar to both Tompkin and Sullivan, Appellees were not required to disclose Dr. Blake as an expert.[9] Appellees sought to have Dr. Blake testify regarding the amount of space between the aorta and sternum, as recorded in the chest x-ray relied upon by Dr. Blake when he rendered his radiology report. Although this information was not contained in the original dictated report, it was within the parameters of Dr. Blake's initial interpretation of the x-ray and the Appellants could reasonably expect him to testify about it. Moreover, it is undisputed that such testimony was well within Dr. Blake's care and treatment of Ms. Toler.

Importantly, because Dr. Blake was a treating physician and his testimony was to be confined to the care and treatment he provided to Ms. Toler, all Appellees were required to disclose was Dr. Blake's identity. In their September 11, 2007 Pre-Trial Memorandum, Appellees properly identified Dr. Blake as a witness by name, and

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[9] The trial court's ruling was rendered on the basis that Appellees did not identify him as an expert witness and submit Rule 26 disclosures to the Appellant. *See* Appellant's May 16, 2008 Motion to Exclude the Testimony of Dr. Roger Blake.

indicated that he was a treating radiologist. The Appellant's counsel chose not to take Dr. Blake's discovery deposition. Furthermore, counsel for Appellees was prohibited from making *ex parte* contact with Dr. Blake in order to discuss his opinion and prepare a Rule 26 disclosure. *See* Keplinger v. Virginia Elec. & Power Co., 208 W. Va. 11, 19-20, 25-26, 537 S.E.2d 632, 640-41, 646-47 (2000) (lawyers are subject to lawsuit for tortious interference with a physician-patient relationship if they make unauthorized *ex parte* contacts with opposing party's treating physician); Morris v. Consolidation Coal Co., 191 W. Va. 426, 432, 446 S.E.2d 648, 654 (1994) (physician-patient fiduciary relationship prohibits party from making *ex parte* communications with opposing party's treating physician). Therefore, this Honorable Court must reverse the ruling of the trial court which excluded the testimony of Dr. Blake, a treating radiologist, regarding the amount of space between the aorta and sternum as recorded in the chest x-ray relied upon by Dr. Blake in rendering his radiology report

## VII. CONCLUSION

In summary, this Honorable Court must affirm the rulings of the trial court which denied the Appellant's request for a new trial and for sanctions because Appellant waived her objections by not requesting a curative jury instruction; there was no violation of the *in limine* order; and even if there was a violation of the *in limine* order, the violation was not clear, was inadvertent, and was not reasonably calculated to cause a rendition of an improper verdict. In addition, the law and evidence in this case clearly demonstrates that Appellees' closing arguments and the cartoon presented were well within the acceptable boundaries for closing arguments permitted by West Virginia Courts. Moreover, the facts of this case demonstrate that

even if the cartoon and closing statements complained of by Appellant were improper, Appellant was not prejudiced by them and they did not result in manifest injustice. The logical conclusion to draw from the facts and proceedings of this case is that Appellant simply failed to establish a breach of the standard of care.

Finally, plain error cannot be used to salvage Appellant's case here because there was no plain error; the trial court ruled on and properly denied Appellant's objections; and to the extent that plain error does exist, Appellant waived it under the doctrine of "invited error" by strategically declining to request a curative jury instruction to remedy the errors complained of. For the reasons stated above, this Honorable Court must affirm the judgment below.

## VIII. RELIEF PRAYED FOR

For the reasons stated above, Appellees respectfully request that this Honorable Court affirm the rulings of the trial court in denying Appellant's request for a new trial and for sanctions. Appellees further request that Appellant's request for attorney fees, costs, and expenses be denied. In the event the this Court does accept Appellant's appeal, this Honorable Court must reverse the trial court's ruling excluding the testimony of Dr. Roger Blake because the disclosure requirements applicable to hired experts do not apply to treating physicians.

Respectfully submitted,

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

MICHELLE JONES, in her
capacity as Administratrix of the
Estate of Julia Toler, Deceased,

Appellant/Plaintiff,

v. Case No. 08-1795

EDWARD R. SETSER, M.D.;
and HUNTINGTON CARDIOTHORACIC SURGERY,
INC.,

Appellees/Defendants

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## CERTIFICATE OF SERVICE

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I, D.C. Offutt, Jr., counsel for the Appellees, Edward R. Setser, M.D. and Huntington Cardiothoracic Surgery, Inc., do hereby certify that I have served a true and correct copy of the **"Brief of Appellees, Edward R. Setser, M.D., and Huntington Cardiothoracic Surgery, Inc.,"** upon the following individuals by U.S. Mail, first class, pre-paid, on this the **30th** day of **April, 2009**:

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